INDRANI RAJARATNAM & ORS

v.

FAIRVIEW SCHOOLS BHD

COURT OF APPEAL, KUALA LUMPUR
NH CHAN JCA
SITI NORMA YAAKOB JCA
KC VOHRAH J
[CIVIL APPEAL NO: W-02-66-1995]
14 JUNE 1997

CIVIL PROCEDURE: *Appeal - Decision of trial judge dismissing oral application for cross-examination - Whether appealable - Whether trial judge erred in his discretion in dismissing application - Whether right to cross-examine was defeated by delay in making application - Rules of the High Court 1980, O. 38 r. 2(3) - Courts of Judicature Act 1964, s. 67(1), 68*

The appellants as petitioners in the court below, commenced winding-up proceedings against the respondent under s. 218(1)(f) and (i) of the Companies Act 1965 ('the Act'). At the hearing of the petition, the appellants made an oral application ('the application') to cross-examine the deponents of the affidavits filed on behalf of the respondent. The learned judge dismissed the application. The appellants now appealed against that dismissal. The issues were: (1) whether the learned judge's dismissal of the application was appealable; (2) whether the learned judge had exercised his discretion correctly; and (3) whether the appellants' right to cross-examine the deponents was defeated by their delay in making the application.

Held:
Per Siti Norma Yaakob JCA (majority)

[1] The issue raised was whether the dismissal of the application to cross-examine the respondent's deponents was a judgment or order which was appealable within ss. 67(1) and 68 of the Courts of Judicature Act 1964 ('CJA'). The present case was concerned with a substantive application under O. 38 r. 2(3) Rules of the High Court 1980 ('RHC') which under normal circumstances would formally be applied by way of summons or motion. Because of the constraint of time, the parties were prepared to do away with such formality, but that did not in itself change the character of the application altogether as it was still made under a specific order and rule which also provided the procedure for doing so. As such, when the learned judge decided that the petition could proceed without the necessity of cross-examining any deponent, he had made an order on a substantive application for which a dissatisfied party could appeal. (p 7 c, h & 8 a)

[2] The grant or refusal of an application under O. 38 r. 2(3) RHC is very much an exercise of a judge's power of discretion and the question that must be determined was whether the learned judge had exercised his discretion judicially. From his written judgment, it was clear that the learned judge considered the following factors when exercising his discretion: (1) that the appellants never identified the issues for which they maintained cross-examination was necessary; and (2) that the appellants had delayed in making the application for cross-examination. Under those circumstances, the learned judge did not err in law or in principle when he exercised his discretion as he had put his mind to relevant considerations in deciding as he did. To that extent there was no justification in interfering with the order the learned judge had made in the court below. (p 8 b-h)

Per KC Vohrah J (majority)

[1] The application was an application that could be and was allowed to be made under O. 38 r. 2(3) RHC and the learned judge's ruling thereon constituted an order which by virtue of s. 67(1) CJA was appealable. (p 9 d)

[2] It is important to take into account all factors when considering an application for cross-examination and if it has little relevance or little weight to the issue which the judge has to decide, then cross-examination should not be permitted. The learned judge certainly considered the issue of relevancy. He was mindful that although the petition was grounded under s. 218 of the Act, yet the appellants had argued that cross-examination was necessary because the basis of the petition was not only mismanagement of the affairs of the respondent under s. 218 but also oppression of minority rights which fell under a different provision, *ie*, under s. 181 of the Act. The notes of proceedings, however, show that at a later stage of the argument, the appellants had argued that the basis of the petition was total disregard of minority rights. The bringing in of minority rights under s. 181 of the Act was completely irrelevant. (p 11 a & h-i)

[3] As for the issue under paras (f) and (i) of s. 218(1) of the Act, the learned judge was of the view that all that had been raised in the appellants' affidavits had in fact been replied to by the respondent's affidavits and quite adequately. That was a clear indication that the learned judge was making short shrift of the argument put forth by the appellants who did not condescend to details, that there were many disputes as to facts that the court would not be able to know what was disputed by merely reading

the affidavits. The learned judge implicitly stated that he was able to decide the petition on the evidence before him based on the affidavits that were filed. (p 12 a-b)

[4] The learned judge in disallowing the application for cross-examination had also taken into consideration the delay in applying for cross-examination. Although the respondent had made issue of it, no explanation was given by the appellants for the delay. (p 12 g-h)

[5] A discretion had been vested in the learned judge under O. 38 r. 2(3) RHC whether to order the attendance for cross-examination of the person making an affidavit on the application of any party and it was not shown that he had exercised his discretion on wrong principles. (p 13 a-b)

[Appeal dismissed.]

*[**Bahasa Malaysia** Translation Of Headnotes]*

Perayu-perayu sebagai pempetisyen dalam mahkamah di bawah, memulakan prosiding penggulungan terhadap responden di bawah s. 218(1)(f) dan (i) Akta Syarikat 1965 ('Akta tersebut'). Di perbicaraan petisyen tersebut, perayu-perayu telah membuat satu permohonan lisan ('permohonan tersebut') untuk memeriksa balas deponen-deponen bagi afidavit-afidavit yang telah difailkan bagi pihak responden. Hakim yang bijaksana telah menolak permohonan tersebut. Perayu-perayu kini merayu terhadap penolakan itu. Isu-isunya adalah: (1) sama ada penolakan hakim yang bijaksana akan permohonan tersebut boleh dirayu; (2) sama ada hakim yang bijaksana telah melaksanakan budibicaranya dengan betul; dan (3) sama ada hak perayu-perayu untuk memeriksa balas deponen-deponen telah dipatahkan oleh kelewatan mereka membuat permohonan tersebut.

Diputuskan:
Oleh Siti Norma Yaakob JCA (majoriti)

[1] Isu yang dibangkitkan adalah sama ada penolakan permohonan untuk memeriksa balas deponen-deponen responden adalah satu penghakiman atau perintah yang boleh dirayu di dalam lingkungan ss. 67(1) dan 68 Akta Mahkamah-Mahkamah Kehakiman 1964 ('CJA'). Kes semasa ini adalah berkenaan dengan permohonan substantif di bawah A. 38 k. 2(3) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT) yang mana di bawah keadaan-keadaan biasa akan secara rasmi dipohon melalui saman atau usul. Disebabkan kesuntukan masa, pihak-pihak tersebut bersedia untuk mengenepikan formaliti yang sedemikian, tetapi itu tidak dengan sendirinya menukar sifat permohonan tersebut sama sekali kerana ianya masih dibuat di bawah satu perintah dan kaedah spesifik yang mana juga

memperuntukan prosedur untuk melakukan sedemikian. Oleh yang demikian, apabila hakim yang bijaksana berkeputusan bahawa petisyen tersebut boleh diteruskan tanpa memerlukan pemeriksaan balas mana-mana deponen, beliau telah membuat satu perintah ke atas satu permohonan substantif bagi yang mana pihak yang tidak berpuashati boleh merayu.

[2] Pemberian atau penolakan sesuatu permohonan di bawah A. 38 k. 2(3) KMT adalah sesungguhnya suatu perlaksanaan akan kuasa budibicara seseorang hakim dan persoalan yang mesti ditentukan adalah sama ada hakim yang bijaksana telah melaksanakan budibicaranya menurut kehakiman. Daripada penghakiman bertulis beliau, ianya adalah jelas bahawa hakim yang bijaksana telah mempertimbangkan faktor-faktor berikut ketika melaksanakan budibicaranya: (1) bahawa perayu-perayu tidak pernah mengenalpastikan isu-isu bagi yang mana mereka telah mempertahankan bahawa pemeriksaan balas adalah perlu; dan (2) bahawa perayu-perayu telah lewat dalam membuat permohonan untuk pemeriksaan balas. Di bawah keadaan-keadaan tersebut, hakim yang bijaksana tidak tersalah pertimbangan di sisi undang-undang atau menurut prinsip ketika beliau melaksanakan budibicaranya kerana beliau telah menumpukan pemikirannya kepada pertimbangan-pertimbangan yang relevan dalam memutuskan sepertimana yang dilakukan olehnya. Setakat itu tidak terdapat justifikasi dalam mencampuri dengan perintah yang telah dibuat oleh hakim yang bijaksana dalam mahkamah di bawah.

Oleh KC Vohrah J (majoriti)

[1] Permohonan tersebut adalah suatu permohonan yang boleh dan dibenarkan dibuat di bawah A. 38 k. 2(3) KMT dan keputusan hakim yang bijaksana ke atasnya membentuk satu perintah yang mana menurut s. 67(1) CJA boleh dirayu.

[2] Ianya adalah penting untuk mengambilkira kesemua faktor-faktor ketika mempertimbangkan sesuatu permohonan untuk pemeriksaan balas dan jika ianya mempunyai kaitan yang sedikit atau pengaruh yang kecil kepada isu yang mana harus diputuskan oleh hakim, maka pemeriksaan balas tidak seharusnya dibenarkan. Hakim yang bijaksana pastinya mempertimbangkan isu perkaitan. Beliau mengambil perhatian bahawa walaupun petisyen tersebut telah diputuskan di bawah s. 218 Akta tersebut, namun perayu-perayu telah berhujah bahawa pemeriksaan balas adalah perlu kerana asas petisyen bukan kerana salah pengurusan akan hal-ehwal responden di bawah s. 218 tetapi juga menindas hak minoriti yang terlingkung di bawah satu peruntukan yang berlainan iaitu di bawah s. 181 Akta tersebut. Nota-nota prosiding, walau bagaimanapun, menunjukkan bahawa di satu peringkat penghujahan tersebut yang terkemudian, perayu-perayu telah

berhujah bahawa asas petisyen tersebut sesungguhnya tidak menghiraukan hak minoriti. Memasukkan hak minoriti di bawah s. 181 Akta tersebut adalah sesungguhnya tidak relevan.

[3] Berhubung dengan isu di bawah perenggan-perenggan (f) dan (i) s. 218(1) Akta tersebut, hakim yang bijaksana berpendapat bahawa kesemua yang telah dibangkitkan dalam afidavit-afidavit perayu-perayu telah pada hakikatnya dijawab oleh afidavit-afidavit responden dan dengan agak mencukupi. Itu merupakan satu petanda yang jelas bahawa hakim yang bijaksana telah membuat penyemakan yang ringkas akan penghujahan yang dikemukakan oleh perayu-perayu yang gagal memberikan butir-butir, bahawa terdapatnya banyak pertikaian berhubung dengan fakta bahawa mahkamah tidak akan dapat mengetahui apakah yang dipertikaikan dengan hanya membaca afidavit-afidavit tersebut. Hakim yang bijaksana secara tidak langsung menyatakan bahawa beliau boleh memutuskan petisyen tersebut atas keterangan di hadapan beliau berdasarkan afidavit-afidavit yang telah difailkan.

[4] Hakim yang bijaksana dalam tidak membenarkan permohonan untuk pemeriksaan balas telah juga mengambil kira kelewatan dalam memohon untuk pemeriksaan balas. Meskipun responden telah menjadikannya isu, tiada penjelasan diberikan oleh perayu-perayu bagi kelewatan tersebut.

[5] Satu budibicara telah diletakkan pada hakim yang bijaksana di bawah A. 38 k. 2(3) KMT sama ada untuk memerintahkan kehadiran untuk pemeriksaan balas orang yang membuat sesuatu afidavit atas permohonan mana-mana pihak dan ianya tidak ditunjukkan bahawa beliau telah melaksanakan budibicara beliau atas prinsip-prinsip yang salah.

[Rayuan ditolak.]

Case(s) referred to:
Comet Products v. Hawkex Plastics [1971] 1 All ER 1145 ***(refd)***
Eng Mee Yong & Ors v. Letchumanan [1979] 2 MLJ 212 ***(refd)***
Leisure & Allied Industries Pty Ltd v. Udaria Sdn Bhd [1980] 1 MLJ 189 ***(refd)***
Re Alwinco Products Ltd [1985] 1 NZLR 710 ***(refd)***

Legislation referred to:
Companies Act 1965, ss. 181, 218(1)(f), (i)
Companies (Winding-Up) Rules 1972, r. 26
Courts of Judicature Act 1964, ss. 67(1), 68
National Land Code, s. 327
Rules of the High Court 1980, O. 38 r. 2(3)

Judicature Act 1908 [New Zealand], s. 66

For the appellants - Yusof Khan; M/s Yusuf Lee Pathma & Marbeck
For the respondent - Rajendra Navaratnam (Conrad Young); M/s Azman Davidson & Co

[Appeal from High Court, Kuala Lumpur; Companies Winding-up No: D5-28-280-1994]

Reported by Usha Thiagarajah

JUDGMENT

Siti Norma Yaakob JCA:

Proceedings were first commenced by the appellants on 25 August 1994, in the Commercial Division of the High Court, at Kuala Lumpur where as the petitioners, the appellants seek the winding up of the respondent under s. 218(1)(f) and (i) of the Companies Act 1965, on the grounds that there has been oppression of minority rights and mismanagement of the affairs of the respondent.

On the day of the scheduled hearing of the petition, the appellants applied orally to cross-examine the respondent's deponents who had filed lengthy affidavits in answer to the petition. The respondent reluctantly agreed to the application being made orally but opposed the application to cross-examine the deponents. Abdul Malek Ahmad J (as he then was) dismissed the application. The learned judge also ruled that the various affidavits filed by both parties are sufficient for a proper hearing of the petition without the need to cross-examine any deponent.

In appealing against this decision, three issues were raised before us.

(1) Whether the learned trial judge's decision is appealable.

(2) Whether the learned trial judge had exercised his discretion correctly.

(3) Whether delay defeats the appellants' right to cross-examine.

Our jurisdiction to hear and determine civil appeals is defined and limited by s. 67(1) of the Courts of Judicature Act 1964 which states as follows:

> The Court of Appeal shall have jurisdiction to hear and determine appeals from any judgment or order of any High Court in any civil cause or matter, whether made in the exercise of its original or of its appellate jurisdiction, subject nevertheless to this or any other written law regulating the terms and conditions upon which such appeals shall be brought.

Section 68 of the same Act lists out the circumstances of certain cases for which no appeal shall be brought to the Court of Appeal. These include:

(1) those cases where the amount or value of the subject matter (exclusive of interest) is less than RM250,000, except with leave of the Court of Appeal;

(2) where the judgment or order is made by the consent of parties;

(3) where the judgment or order relates to costs, except with leave of the Court of Appeal;

(4) where by written law, the judgment or order is expressly declared to be final.

The issue raised is whether the dismissal of the appellants' oral application to cross-examine the respondent's deponents falls within the ambit of ss. 67(1) and 68, in that it is a judgment or order which is appealable. The respondent maintains it is not, as it is only a ruling made in the course of interlocutory proceedings which does not determine the main issue or issues before the court and for this relies on the New Zealand case of *Re Alwinco Products Ltd.* [1985] 1 NZLR 710. There, the Court of Appeal held that the court's jurisdiction to hear and determine appeals conferred by s. 66 of the New Zealand Judicature Act 1908 (substantially similar to s. 67(1) of our Act) is limited to the hearing of appeals against a "judgment", "decree" or "order". Thus a ruling by the learned trial judge in that case that a tender made by Alwinco Products Ltd (the company sought to be wound up) of all sums due to the petitioning creditor, was not sufficient in law to establish that Alwinco was able to settle its debts, was held to be a ruling which confers no right to appeal at all. The petitioning creditor was still entitled, despite its rejection of the tender, to proceed with its petition against Alwinco. The New Zealand Court of Appeal held that it had no jurisdiction to entertain an appeal from the judge's ruling and that the petitioning creditor was entitled to proceed as the ruling was not a judgment, a decree or an order. The Court of Appeal reasoned that the ruling was a step in the hearing of argument on a petition and it achieved no final disposal of what was before the High Court. A further hearing was necessary as "a ruling on a question of law not necessarily decisive of the particular issue before the court, shall not be seen in such circumstances as conferring a right of appeal."

Herein lies the distinguishing mark of this New Zealand case as the decision was reached following arguments on a submission made by one party that was strenuously objected to by the other. Unlike *Alwinco Products*, our instant case is concerned with a substantive application under O. 38 r. 2(3) of the Rules af the High Court 1980, which under normal circumstances would formally be applied by way of summons or motion. In this case, because of the constraint of time, the parties were prepared to do away with such formality, but this does not in itself change the character of the application altogether

as it is still made under a specific order and rule which also provide the procedure for doing so. As such when Abdul Malek, J (as he then was) decided that the petition can proceed without the necessity of cross-examining any deponent, he had made an order on a substantive application for which a dissatisfied party can appeal.

The grant or the refusal of an application under O. 38 r. 2(3) is very much an exercise of a judge's power of discretion and the question that must be determined is whether Abdul Malek, J (as he then was) had exercised his discretion judicially. From his written judgment, it is very clear that the learned judge considered the following factors when exercising his discretion.

(1) That the appellants never identified the issues for which they maintain cross-examination had become necessary. This is not surprising as no formal application was made by them. Even so a perusal of the proceedings recorded by the trial judge fails to disclose what the issues are to warrant cross-examination. Apart from stating orally that the respondent's many affidavits by various deponents raise many disputes as to facts, such disputes have not been identified by the appellants. If indeed there are factual disputes, the appellants have also failed to show whether they are relevant to the petition to warrant cross-examination. On the contrary the learned trial judge found that the cross-examination would not advance the cause of justice as there is sufficient affidavit evidence supported by contemporaneous documents to enable the petition to be heard properly without the need of cross-examination.

(2) That the appellants delayed in making the application to cross-examine. The oral application was made on 24 January 1995, the second time the petition was adjourned to be heard on its merits. The learned trial judge considered that the application should have been made earlier when the petition was initially fixed to be heard on its merits on 20 December 1994. There was no indication then that the appellants intended to cross-examine any of the respondent's deponents even though their affidavits had already been filed in court.

Under these circumstances, I do not consider that the learned trial judge had erred in law or in principle when he exercised his discretion as he had put his mind to relevant considerations in deciding as he did. To that extent I see no justification in interfering with the order he had made in the court below.

For the reasons given, this appeal is dismissed with costs and the deposit be remitted to the respondent to account of its taxed costs.

KC Vohrah J

In this matter, in the Kuala Lumpur High Court, the learned judge made an order dismissing the application of the appellants ('the petitioners') to cross-examine the affiants of the affidavits filed on behalf of the respondent company ('the respondent') in a winding up petition. The petitioners appeal against this order.

With respect, I agree with the view and reasons expressed by NH Chan and Siti Norma Yaakob JJCA in their judgments that the order made by the learned judge is an appealable order having regard to s. 67(1) of the CJA. I also share their view that the New Zealand case of *Re Alwinco Products Ltd* [1985] 1 NZLR 710 turned on a different point of law and is not relevant for the purposes of this case; the New Zealand Court of Appeal was of the view that the ruling of the High Court judge rejecting the submission made on a mere preliminary question of law in the course of a winding up petition was a step in the hearing of argument on a petition and it achieved no final disposal of what was before the court and was not appealable while the ruling in this matter is one that disposed of a matter, ie, there was an application that could be and was allowed to be made under O. 38 r. 2(3) of the RHC, and the ruling thereon constitutes an order which by virtue of s. 67(1) of the CJA is appealable.

However, I have to respectfully depart from the view of NH Chan JCA that the appeal should be allowed. I concur with respect with the view of Siti Norma Yaakob JCA that the appeal should be dismissed.

From the title of the petition for winding up, it is clear that the petition is grounded under s. 218 of the Act. The winding up petition appears to be based on two grounds under s. 218(1) of the Act, firstly, that the directors had acted in the affairs of the company in their own interest rather than in the interests of the members as a whole, or in any other manner whatsoever which appears to be unfair or unjust to other members (para. (f) of s. 218(1) of the Act) and, secondly, that it is just and equitable that the company be wound up (para. (i) of s. 218(1) of the Act).

To set out the background of this case – the hearing of the petition to wind up the respondent (filed on 25 August 1994) came up for the second time before the learned judge on 24 August 1995. At that stage, counsel for the petitioners applied to cross-examine the affiants of the affidavits filed on behalf of the respondents without there being a proper formal application for such purpose. Counsel for the respondents, however, reluctantly agreed to the application being made orally *in lieu* of the formal application in order to avoid a further delay in the hearing of the petition.

There was confusion as to what the purpose of the proposed cross-examination was for, there being no attempt to show what was needed to be adduced under the proposed cross-examination of the affiants. The learned counsel for the petitioners predicated his oral application on the vague ground that there were so many disputes as to facts that the court would not be able to know what was disputed merely by reading the affidavits. He stressed that 'since (the) basis for the petition is oppression of minority rights and mismanagement of (the) affairs of the company cross-examination is necessary.' He then finally submitted, after counsel for the respondent had made his submission, that 'the basis of the petition is total disregard for minority rights'.

It is not surprising that in opposing the application, learned counsel for the respondent pointed out that no effort had been made to show what the issues were, although the court had discretionary power to direct oral evidence be taken on the petition. He also pointed out that the petition for winding up was based on paras. (f) and (i) of s. 218(1) of the Act and yet counsel had relied on the ground of oppression of minority rights (s. 181 of the Act) to argue that cross-examination was necessary. He also raised the objection that there was delay on the part of the petitioners in making the application.

The learned judge adjourned the hearing to another date to consider the application. At the resumed hearing, he dismissed the petitioners' application. The learned judge held, *inter alia*, that the counsel for the petitioners had not identified the issues relevant for the proposed cross-examination under s. 181 of the Act and that in respect of paras. (f) and (i) of s. 218 of the Act, various matters raised in the petitioners' affidavits had been replied to in the affidavit filed on behalf of the respondent and the affidavits sufficed for a proper hearing of the petition without the need for cross-examination.

The learned judge also found that there was delay on the part of the petitioners in making the application for the cross-examination of the affiants.

The petition for the winding up of the respondent company is supported, as statutorily required under r. 26 of the Companies (Winding Up) Rules 1972, by a verifying affidavit. It was deposed to by the fifth petitioner and contains a number of allegations of facts which are essentially of a hearsay character. In opposing the winding up petition, three affidavits, two deposed to by a director of the company and another by the corporate secretary of the company, allege certain facts within their own knowledge which dispute the facts raised in the verifying affidavit and the other two more affidavits deposed to by the fifth petitioner and another deposed to by a former chairman of the respondent where the affiants deposed to facts within their personal knowledge. To be noted is that the petitioners were no longer merely relying on the statutorily required verifying affidavit to the petition to substantiate their allegation of facts.

It is important to take into account all factors when considering an application for cross-examination and if it has little relevance or little weight to the issue which the judge has to decide, then cross-examination should not be permitted. As was reminded by Megaw LJ in *Comet Products v. Hawkex Plastics* [1971] 1 All ER 1145 at pp. 1146-1147:

> ... In general, I think that in interlocutory proceedings, where there is *bona fide* application to cross-examine a deponent on his affidavit, that application should normally be granted. There can be no suggestion here that the application on behalf of the plaintiffs is anything other than *bona fide*. But for the second defendant it was said that, against a person whose committal for contempt of court is sought, such an order should be made only in the most exceptional circumstances. I do not accept that. As a general proposition, I think it is too widely stated. But the fact that it is a proceeding which may result in punishment, whether by imprisonment or fine or sequestration, is not irrelevant. It is a proper factor to be taken into consideration by the judge, along with other factors, in proceedings such as this where an application for cross-examination is resisted. What weight it will have must depend on the circumstances of the particular case. In some cases, it may have little or no weight. One feature which may make it of substantial weight is when it becomes apparent that the necessary result of the cross-examination, while the cross-examination is perfectly properly conducted, is likely at the best to have a very small relevance to the issue which the judge has to decide in comparison with the effect it may have on the matters in the litigation, which are not properly in issue on the contempt motion.
>
> In my view therefore, the appeal should be allowed and the cross-examination should not be permitted.

It will be noted that in a local case, *Leisure & Allied Industries Pty Lyd v. Udaria Sdn Bhd* [1980] 1 MLJ 189, Salleh Abas FJ (as he then was) when dealing with an application by the defendant to cross-examine the plaintiff's witnesses on their affidavits took the same view and proceeded to 'see how the proposed cross-examination would be relevant to the issue' in the plaintiff's application in order for him to exercise his discretion.

The learned judge in this matter under appeal certainly considered the issue of relevancy. The learned judge was mindful that although the petition was grounded under s. 218 of the Act, yet counsel for the petitioners had argued that cross-examination was necessary because the basis of the petition is not only mismanagement of the affairs of the company, which falls under s. 218 of the Act, but also oppression of minority rights, which falls under a different provision, s. 181 of the Act. The notes of proceedings, however, show that at a later stage of the argument, counsel for the petitioners had, as pointed out earlier, argued that 'the basis of the petition is total disregard of minority rights'. To my mind, quite clearly, the bringing in of the ground of oppression of minority rights under s. 181 of the Act is completely irrelevant.

As for the issue under paras. (f) and (i) of s. 218(1) of the Act, the learned judge was of the view that 'all that had been raised in the petitioner's affidavit ... had in fact been replied by the respondent's affidavit ... had in fact been replied by the respondent's affidavits quite adequately ...'. This is clearly an indication by the learned judge that he was making short shrift of the argument put forth by counsel for the petitioners (who did not condescend to details) that there were so many disputes as to facts that the court would not be able to know what was disputed by merely reading the affidavits. Implicit in that statement by the learned judge is that the learned judge is able to decide the petition on the evidence before him, which in this case comprises what are alleged in all the aflidavits filed in the case. One is reminded of what Lord Diplock had to say in *Eng Mee Yong & Ors v. Letchumanan* [1979] 2 MLJ 212 at p. 217 in respect of a judge resolving conflicts of evidence on affidavits in a case arising under s. 327 of the National Land Code:

> ... Although in the normal way it is not appropriate for a judge to attempt to resolve conflicts of evidence on affidavit, this does not mean that he is bound to accept uncritically, as raising a dispute of fact which calls for further investigation, every statement on an affidavit however equivocal, lacking in precision, inconsistent with undisputed contemporary documents or other statements by the same deponent, or inherently improbable in itself it may be. In making such order on the application as he 'may think just', the judge is vested with a discretion which he must exercise judicially. It is for him to determine in the first instance whether statements contained in affidavits that are relied upon as raising a conflict of evidence upon a relevant fact have suficient *prima facie* plausibility to merit further investigation as to their truth. Since this is a matter upon which the opinions of individual judges may reasonably differ, an appellate court ought not to interfere with the judge's exercise of this discretion under s. 327 of the National Land Code unless the way in which he exercised it is shown to have been manifestly wrong ...

The learned judge in disallowing the application for cross-examination had also taken into consideration the matter of delay in making the application for cross-examination. As pointed out by the learned judge, the petition had originally been schedule to be heard on 20 December 1994, but counsel for the petitioners had applied for a postponement to await a decision pending before another judge on two matters, although both counsel for the respondent were prepared to go on with the hearing. The learned judge was of the view that the application to cross-examine should have been made at that juncture or they should have filed a formal application. The point is that no explanation was given for the delay although counsel for the respondent had made issue of it.

A discretion has been vested in the judge under O. 38 r. 2(3) of the RHC whether to order the attendance for cross-examination of the person making an affidavit on the application of any party and he has exercised his discretion and it has, to my mind, not been shown that he has exercised his discretion on wrong principles and I think the court should be slow to interfere with the discretion he has exercised.

In all the circumstances of this case, I agree with the view of Siti Norma Yaakob JCA to dismiss the appeal with costs and to order that the sum deposited by way of security for the costs of this appeal be paid to the respondent towards the account of its taxed costs.